Filed 9/14/01; part. pub. order 10/12/01 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

LESTER A. SIMMONS et al., Cross-complainants and Appellants, v. ALLSTATE INSURANCE COMPANY, Cross-defendant and Respondent.	C034619 (Super. Ct. No. 99AS03379)

California's anti-SLAPP statute (Code Civ. Proc., § 425.16 [all further unspecified statutory references are to this code]) allows dismissal, at an early stage, of a lawsuit designed primarily to chill the exercise of First Amendment rights.[1] It

[1] "SLAPP is an acronym for Strategic Lawsuit Against Public Participation. SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants." (*Lafayette Morehouse, Inc.* v. *Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 858 (*Lafayette Morehouse*).)

permits a special motion to strike any cause of action designed to deter acts in furtherance of a person's right of petition or free speech. (§ 425.16, subd. (b).)

In this case, Lester A. Simmons, Ute Simmons, and related business entities appeal from an order striking, as a SLAPP suit, a defamation-based cross-complaint they filed against Allstate Insurance Company (Allstate) in response to an unfair business practice suit by Allstate charging the Simmons defendants with bilking insurance companies and overtreating patients.

Seeking reversal, the Simmons defendants contend that Allstate never carried its burden of showing that the cross-complaint fell within the statutory definition; alternatively, if some of the allegations did fall into the SLAPP category, they claim the trial court erred in refusing to grant leave to amend the pleading to eliminate the offending verbiage.

We conclude the trial court correctly struck the cross-complaint and did not err in refusing leave to amend. We shall affirm and award Allstate attorney fees in connection with defending the appeal.

PROCEDURAL OVERVIEW

Allstate's Complaint

In June 1999, Allstate filed a complaint against Lester A. Simmons, individually and doing business as Lester A. Simmons, D.C., various other Simmons-related business entities, and

Robert A. McAuley, M.D.[2] The opening paragraph aptly conveys the tenor of the complaint: "This action arises out of an illegal scheme to defraud Allstate, its insureds, as well as other insurers and their insureds, through the creation, submission and prosecution of fraudulent, inflated, and exaggerated medical bills and medical records, the performance of unnecessary medical tests and treatments, illegal ownership of chiropractic and medical corporations, the utilization of unlicensed physical therapists to treat patients, and related claims for insurance benefits."

Allstate averred that defendants engaged in three main forms of illegal conduct: (1) intentional and consistent abuse of the American Medical Association physicians' current procedural terminology codes (CPT codes) by fraudulently increasing the amounts billed to Allstate and exaggerating the claims of patients; (2) operating chiropractic and medical clinics without valid licenses; and (3) employing unlicensed physical therapists.

Pursuant to the Unfair Business Practices Act (Bus. & Prof. Code, § 17200 et seq.), Allstate sought injunctive relief against defendants' allegedly deceptive and fraudulent practices, disgorgement of unlawful profits obtained by reason

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[2] Dr. McAuley, a physiatrist, is a principal shareholder along with Simmons in an entity known as RX Spinal Care, an entity which operates clinics under a variety of different names at a number of locations throughout the Sacramento area.

of his conduct, and payment of attorney fees and costs pursuant to section 1021.5.

Simmons's Cross-complaint

Lester A. Simmons, Ute Simmons, and their various business entities, including Owlstone Asset Management, Inc., which operates seven clinics in the Sacramento area (collectively Simmons) responded with a cross-complaint against Allstate and "Roes 1 through 500" who were alleged to be partners and other joint venturers of Allstate.

Contending that new laws have driven up Allstate's costs, the cross-complaint charges Allstate and other insurance companies with conspiring to force chiropractors such as Simmons out of business in retaliation for their refusal to accept managed care treatment and billing practices. Allstate has done this through maliciously filing frivolous lawsuits, waging a "media war . . . through the use of slanderous, defamatory and libelous statements," making defamatory statements outside litigation, and wrongfully refusing to pay for authorized care and legitimate claims.

Based on this allegedly wrongful conduct, the cross-complaint posits nine tort causes of action, cast under a variety of legal theories. Notable among them is the slander cause of action, which alleges Allstate levied false charges that Simmons overtreats patients, uses a sham medical director, engages in tax and mail fraud, and is fleeing the country to avoid prosecution.

The Motion to Strike

Allstate brought a motion to strike the cross-complaint under section 425.16, on the ground that all of Simmons's causes of action arose out of statements in connection with issues under consideration by a judicial or executive body, as well as issues of public interest.

In support of the motion, Allstate asked the court to take judicial notice of certain documents, two of which reflect formal disciplinary proceedings before the state Board of Chiropractic Examiners (the Board): a Board order denying Simmons's motion to dismiss an accusation filed by the state Department of Justice and a "Proposed Decision" which included factual findings, rendered by Administrative Law Judge Jaime Rene Roman.

The order denying the motion to dismiss found that Simmons, while holding an inactive license, improperly engaged in business activities requiring an active license, improperly advertised the rendering of physical therapy services which is expressly prohibited by his license, inappropriately advertised his services and improperly solicited patients under the guise of cost-free participation in a scientific research study about pain. The proposed decision found that Simmons had engaged in numerous violations of the Chiropractic Act, including (1) performing examinations with no regard for medical necessity; (2) referring patients, regardless of their medical condition, to Dr. McAuley, who found justification for chiropractic care that was not medically necessary or justified; (3)

"inappropriately and fraudulently" billing for levels of service or services not rendered to patients; (4) routinely and fraudulently billing for unperformed X-rays and submitting X-ray reports that were either medically unjustified or not rendered; and (5) tying the rendering of services to employee bonuses, thereby impairing the application of unfettered, conflict-free chiropractic judgment. Characterizing Simmons as "a businessman, not a professional, focused primarily on profit, statistics, productivity, formal legalities, and the receipt of account receivables," Judge Roman's decision orders revocation of Simmons's license to practice chiropractic and reimbursement to the Board of $88,000 in prosecution and enforcement costs.

Allstate also asked the court to take judicial notice of other actions filed by various insurance companies against Simmons for unfair business practices. Simmons opposed the motion to strike and objected to the request for judicial notice.

At the hearing on the motion Simmons's counsel, faced with an adverse tentative ruling, asked the court to grant Simmons leave to amend the cross-complaint. The court issued an order striking Simmons's cross-complaint and denied leave to amend.

APPEAL

I

Anti-SLAPP Principles

Section 425.16 provides, inter alia, that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech

under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Initially, the defendant bears the burden of making a prima facie showing the plaintiff's cause of action arises from the defendant's free speech or petition activity. "'If the defendant establishes a prima facie case, then the burden shifts to the plaintiff to establish "'a probability that the plaintiff will prevail on the claim,'" i.e., "make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor." [Citation.] In making its determination, the trial court is required to consider the pleadings and the supporting and opposing affidavits . . . .' [Citation.]" (*Kyle* v. *Carmon* (1999) 71 Cal.App.4th 901, 907 (*Kyle*), quoting *Church of Scientology* v. *Wollersheim* (1996) 42 Cal.App.4th 628, 646 (*Scientology*).) A cross-complaint is subject to an anti-SLAPP motion to strike, with these same rules applying. (*Scientology*, *supra*, at p. 651; § 425.16, subd. (h).) On appeal, the trial court's ruling on an anti-SLAPP motion is subject to de novo review. (*Scientology*, *supra*, at p. 653.)

II

Prima Facie Showing

Simmons contends that Allstate did not carry the initial burden of showing that *each* cause of action in the cross-complaint arose from a protected free speech right within the

meaning of section 425.16. Therefore, Simmons maintains, the burden never shifted to him to show a probability of success.

Under subdivision (b) of section 425.16, the cross-complaint qualifies as an anti-SLAPP suit if it "aris[es] from" activity by a defendant or cross-defendant "in furtherance of . . . free speech . . . in connection with a public issue." The Legislature has amplified this amorphous standard in subdivision (e), where it lists four examples of such speech. Two of these are pertinent here: subdivision (e) defines an "act in furtherance of a person's right of petition or free speech" to include: "(2) *any written or oral statement or writing made in connection with an issue under consideration or review by a* legislative*, executive, or judicial body, or any other official proceeding authorized by law;* . . . (4) or *any other conduct in furtherance of* the exercise of the constitutional right of petition or *the constitutional right of free speech in connection with a public issue or an issue of public interest*." (Italics added.)

The moving and opposing papers, together with the pleadings, establish that Simmons was subjected to disciplinary action by the Board where an administrative law judge rendered a decision ordering revocation of his license based on factual findings that he had improperly engaged in chiropractic activities requiring an active license, generated inappropriate and fraudulent billings, performed unnecessary services, and engaged in false advertising.

These findings serve as a platform for Allstate's complaint charging Simmons for multiple violations of the Unfair Business Practices Act. Specifically, Allstate claimed Simmons had engaged in a scheme to defraud it and other insurers by processing false and fraudulent claims, inflating and exaggerating medical bills and records, rendering unnecessary treatment, using unlicensed therapists, and operating unlicensed clinics.

In retaliatory fashion, Simmons's cross-complaint vaguely accuses Allstate of trying to drive him out of business through malicious lawsuits, waging a "media war" of false and defamatory statements and wrongfully refusing to pay for authorized care. When it comes to specifics the tortious acts complained of echo many of the same allegations appearing in Allstate's complaint and the findings of the administrative law judge: statements in litigation and to the media that Simmons overbills, overtreats patients, perpetrates false advertising, and engages in activities without required licenses. It takes no leap of logic to conclude that the cross-complaint "aris[es] from" speech in connection with issues under consideration before the Board.[3] (§ 425.16, subd. (e)(1).)

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[3] Citing *Sosinsky* v. *Grant* (1992) 6 Cal.App.4th 1548 and *Joslin* v. *H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, Simmons contends that the trial court improperly took judicial notice of *the truth* of the administrative law judge's findings, thereby sullying him with prejudicial "bad act" evidence.

The argument overlooks the fact that it was unnecessary for the trial court to accept the *truth* of the findings in order to grant the motion to strike. Section 425.16 merely requires

It is also apparent the cross-complaint arises from speech relating to a topic of public importance, i.e., insurance fraud. As Allstate points out, the Legislature has expressly found that automobile insurance fraud is a problem of crisis proportions and of statewide significance.[4] The cross-complaint thus qualifies under the "issue of public interest" prong of the statute. (§ 425.16, subd. (e)(4).)

Simmons insists however that Allstate failed to demonstrate that his cross-complaint was based on "statements made about this lawsuit, and/or for statements made about the license revocation proceeding." (Underscoring in original.) This argument takes a far too restrictive view of the scope of the legislation.

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that, to qualify as a SLAPP cause of action, there be a "connection with" "issue[s]" that are before a judicial or administrative body. As *Sosinsky* notes, it is perfectly proper to take judicial notice of the fact that *particular findings were made* without necessarily accepting the truth of such findings. (6 Cal.App.4th at p. 1565.) Here, the fact that administrative findings of fraud, overbilling, overtreating, and unlicensed activities were made is sufficient to show there is a nexus between Simmons's lawsuit and issues "under consideration" by the Board.

4 Insurance Code section 1871 provides in part: "The Legislature finds and declares as follows: [¶] (a) That the business of insurance involves many transactions which have potential for abuse and illegal activities. . . . [¶] (b) That insurance fraud is a particular problem for automobile policyholders; fraudulent activities account for 15 to 20 percent of all auto insurance payments. Automobile insurance fraud is the biggest and fastest growing segment of insurance fraud and contributes substantially to the high cost of automobile insurance with particular significance in urban areas."

The Legislature has expressly mandated that section 425.16 shall be "construed broadly." (§ 425.16, subd. (a).) The quoted language was added in 1997 (Stats. 1997, ch. 271) in response to a concern that "some courts have failed to understand that this statute covers *any conduct in furtherance of the constitutional rights of petition and of free speech in connection with a public issue or with any issue of public interest.*" (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997 Reg. Sess.) as amended July 2, 1997, p. 2; italics added.) The statute provides a remedy for early dismissal of suits which "'are aimed at preventing citizens from exercising their political rights or *punishing those who have done so*.'" (*Id*. at p. 2, quoting Pring and Canan, SLAPPS: Getting Sued for Speaking Out, Temple University Press (1996); italics added.)

Simmons's contention that every allegation of the putative SLAPP complaint must be "about" issues that were the subject of an administrative or judicial proceeding runs counter to the legislative directive to construe the statute broadly. Furthermore, we discern no requirement that there be sublime congruence between the tortious acts alleged in a SLAPP complaint and the issues raised in a judicial or administrative forum. Rather, section 425.16 requires only a *nexus* between the statements made regarding such issues and the cause of action against the speaker, such that the cause of action may be fairly said to have "aris[en] from" the statements made by the speaker. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113 (*Briggs*).) Although not expressly stated

therein, the above principle is deducible from the holdings in *Lafayette Morehouse* and *Briggs.*

In *Lafayette Morehouse, supra,* 37 Cal.App.4th 855, a newspaper published a series of articles about an offbeat private university which permitted a large number of homeless persons to live in tents on campus. This sparked a local controversy when neighbors and store owners complained of increased crime, littering, and panhandling. Hearings on the issue were held by the board of supervisors, and the county filed an action to enjoin the university's use of the property as violative of zoning and health regulations. (*Id*. at p. 860.) The author characterized the university as a "sensuality school" with a unique course in "carnal knowledge" and included reports of prostitution and illegal drug use by students. (*Id*. at pp. 860-861.)

The university sued the newspaper for defamation and libel. On the newspaper's motion, the complaint was stricken by the trial court as an anti-SLAPP suit and the Court of Appeal affirmed. The court held that the newspaper's articles were related to the university's dispute with its neighbors and county officials, and therefore qualified as speech in connection with a public issue. (*Layfayette Morehouse, supra,* 37 Cal.App.4th at p. 863.) Clearly, the articles exposing the university's unusual curriculum (which formed the basis of the defamation causes of action) were not strictly *about* the homeless dispute which had grabbed the public spotlight. Yet the court had no trouble finding a nexus between the public

controversy and the newspaper articles under section 425.16, subdivision (e).

In *Briggs*, husband and wife landlords sued Eden Council for Hope and Opportunity (ECHO), a tenants' rights group which had counseled tenants and mediated landlord-tenant disputes. ECHO assisted an African-American woman in filing a small claims action in civil court and a grievance against the landlords before the federal Department of Housing and Urban Development (HUD). (19 Cal.4th at pp. 1109-1110.) The landlords sued ECHO for defamation and infliction of emotional distress. The suit referred not only to statements made in connection with the HUD investigation and small claims litigation, but other alleged defamatory statements by ECHO directors accusing the landlords of being "on a 'witchhunt,'" of having made "racist comments" and questioning whether they were "mentally unbalanced." (*Id*. at p. 1110.)

The Supreme Court held that "[the landlords'] causes of action against ECHO *all arise from* ECHO's statements or writings made in connection with issues under consideration or review by official bodies or proceedings -- specifically, HUD or the civil courts." (*Briggs, supra,* 19 Cal.4th at p. 1115, italics added.) The *Briggs* court did not view a suit based on ECHO's generalized disparaging remarks about the landlords as beyond the reach of section 425.16 merely because the statements were not strictly *about* the issues raised in administrative and civil proceedings.

Here too, while not every single tortious act alleged by Simmons is directly tied to Allstate's complaint-in-chief or the

disciplinary proceedings before the Board, the tone and import of the cross-complaint leaves no doubt that the causes of action were precipitated by, and are connected to, statements about Simmons's dishonest behavior, fraudulent billing practices and the like, issues which were raised in judicial and administrative proceedings.

We conclude the trial court properly found that Allstate made a prima facie showing that the cross-complaint arose from statements made by Allstate in connection with issues of public significance raised before the Board and in the superior court.

Because Simmons made no attempt to show a probability of his prevailing on the merits, the court properly granted Allstate's motion to strike.

III

Anti-SLAPP Characteristics

Simmons urges that the trial court erred in granting the motion to strike his cross-complaint because it is simply not the type of lawsuit the Legislature had in mind in enacting the anti-SLAPP statute. Portraying himself and his businesses as "just little-guy chiropractors who have sued Goliath ALLSTATE . . . for trying to put them out of business" Simmons contends, "[t]here was no showing whatsoever that [Simmons's] instant action has or ever could prevent this giant insurance company from exercising its free speech and other political rights. It is simply ludicrous to believe that this Respondent, with billions of dollars in assets at its ready command, could somehow be 'chilled' from doing anything it wants to do by

Appellants' instant action." The argument misconstrues the legislative intent behind section 425.16.

Although a SLAPP suit generally involves a large corporate entity knowingly filing a meritless action "to deter common citizens from exercising their political or legal rights or to punish them for doing so" (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741), there is no evidence that the Legislature sought to limit the protection afforded by section 425.16 to defendants who are economically outmatched. Instead, as its statement of intent makes plain, the Legislature declared it "in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).)

The First Amendment bestows the right to speak out on issues of public significance on large corporations and private individuals alike. Our cases have recognized that SLAPP suits are not "always filed by powerful and wealthy plaintiffs against impecunious protesters . . . ." (*Lafayette Morehouse, supra,* 37 Cal.App.4th at p. 864, citing *Wilcox* v. *Superior Court* (1994) 27 Cal.App.4th 809, 815-816.) Indeed, in *Lafayette Morehouse* and in the later case of *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1049-1052, orders striking SLAPP suits were affirmed in instances where a well-heeled prestigious newspaper publisher was sued by relatively impecunious private parties.

A SLAPP suit does not necessarily involve a complainant who is less powerful or wealthy than the defendant, nor is the

complainant's objective always to stifle citizen dissent. The complainant may file the suit for tactical reasons, hoping to drive up the cost of litigation to the point where the opposing party will be distracted from its goal or have fewer resources available. "[L]ack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed . . . only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective." (*Wilcox, supra,* 27 Cal.App.4th at p. 816.)

We conclude Simmons's lesser economic stature relative to Allstate is of no relevance to whether his cross-complaint constituted an anti-SLAPP suit. As long as it qualified under the statutory definition, it was properly stricken.

IV

Leave to Amend

Simmons's other major argument is that the court should have granted his oral request for leave to amend the cross-complaint so as to remove any allegations that might be "objectionable" under the anti-SLAPP statute. He reasons that SLAPP motions are analogous to demurrers and motions to strike, in which it is recognized that leave to amend should be liberally granted.

Simmons's premise is faulty. Unlike demurrers or motions to strike, which are designed to eliminate sham or facially meritless allegations, at the *pleading* stage a SLAPP motion, like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing. As we observed in *Kyle, supra,*

the test applied to a SLAPP motion is similar to that of a motion for summary judgment, nonsuit, or directed verdict. (71 Cal.App.4th at pp. 907-908.) Evidence is considered, but not weighed. If the initial evidentiary burden is met by the moving party, the burden shifts to the party opposing the motion to avoid dismissal of the action. (*Scientology*, *supra*, 42 Cal.App.4th at p. 646.)

As Simmons concedes, the anti-SLAPP statute makes no provision for amending the complaint once the court finds the requisite connection to First Amendment speech. And, for the following reasons, we reject the notion that such a right should be implied.

In enacting the anti-SLAPP statute, the Legislature set up a mechanism through which complaints which arise from the exercise of free speech rights "can be evaluated at an early stage of the litigation process" and resolved expeditiously. (*Lafayette Morehouse*, *supra*, 37 Cal.App.4th at p. 865.) Section 425.16 is just one of several California statutes which provide "a procedure for exposing and dismissing certain causes of action lacking merit." (*Lafayette Morehouse, supra,* at p. 866.)

Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the

vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend.

By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. (See *Dixon* v. *Superior Court, supra,* 30 Cal.App.4th at p. 741.) Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. (*Scientology*, *supra*, 42 Cal.App.4th at p. 645.) This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits. (*Wilcox*, *supra*, 27 Cal.App.4th at p. 823.)

We conclude the omission of any provision in section 425.16 for leave to amend a SLAPP complaint was not the product of inadvertence or oversight. Accordingly, we refuse Simmons's invitation to read into section 425.16 an implied right of leave to amend. On the contrary, we believe that granting leave to amend the complaint after the court finds the defendant had established its prima facie case would be jamming a procedural square peg into a statutory round hole.

V

Due Process

In a separately headed argument, Simmons claims that the refusal to read into section 425.16 an implied right of leave to

amend would violate due process. However, he provides no coherent constitutional argument other than the bare assertion that failing to allow him leave to amend would be fundamentally "unfair." Arguments presented in such raw, undeveloped form without appropriate citation to supporting authority are considered waived on appeal. (*Troensegaard* v. *Silvercrest Industries*, Inc. (1985) 175 Cal.App.3d 218, 228.) We note that most constitutional attacks on section 425.16 have already been rejected. (*Lafayette Morehouse*, *supra*, 37 Cal.App.4th at pp. 864-868.)

VI

Attorney Fees

Allstate requests an award of attorney fees for defending this appeal, pursuant to section 425.16, subdivision (c). The request is proper. "A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise." (*Evans* v. *Unkow* (1995) 38 Cal.App.4th 1490, 1499.) Thus, Allstate is entitled to recover its attorney fees on appeal. (§ 425.16, subd. (c); *Sipple* v. *Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 250; *Dove Audio, Inc*. v. *Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.)

DISPOSITION

The order appealed from is affirmed. The cause is remanded to the trial court to award reasonable attorney fees to Allstate for this appeal. Allstate shall recover costs.

CALLAHAN, J.

We concur:

NICHOLSON, Acting P.J.

RAYE, J.

Filed 10/12/01

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

LESTER A. SIMMONS et al., Cross-complainants and Appellants, v. ALLSTATE INSURANCE COMPANY, Cross-defendant and Respondent.	C034619 (Super. Ct. No. 99AS03379) ORDER FOR PARTIAL PUBLICATION

APPEAL from a judgment of the Superior Court of the County of Sacramento, John R. Lewis, Judge. Affirmed.

Law Offices of Wanland & Bernstein, Donald M. Wanland, Jr., Richard P. Bernstein, and Daniel Boone, for Cross-complainants and Appellants.

Manning & Marder, Kass, Ellrod, Ramirez, LLP, Dennis B. Kass, David J. Wilson, and Julie Fleming, for Cross-defendant and Respondent.

THE COURT:

The opinion in the above entitled matter filed September 14, 2001, was not certified for publication in the Official Reports.

For good cause it now appears the opinion should be published and accordingly, it is ordered that the opinion be published with the exception of parts I, II, III, V, and VI, pursuant to California Rules of Court, rules 976(b) and 976.1.

FOR THE COURT:

NICHOLSON

_____, Acting P.J.

RAYE

_____, J.

CALLAHAN

_____, J.